

SUMMARY OF ADMINISTRATIVE PROCEEDINGS

Plaintiff filed his application for DIB on December 11, 1996. (Administrative Record ("A.R.") 160-62.) Plaintiff claims to have been disabled since August 2, 1995, due to back and leg impairments and related pain, as well as depression. (A.R. 16, 160, 183.) Plaintiff has past relevant experience as a truck driver, operating engineer/heavy equipment operator, and stage hand. (A.R. 16, 165, 228.)

The Commissioner denied Plaintiff's claim for benefits initially and upon reconsideration. On June 30, 1998, Plaintiff, who was represented by counsel, appeared and testified at a hearing before Administrative Law Judge Zane Lang ("ALJ Lang"). (A.R. 38-92.) On August 26, 1998, ALJ Lang remanded the case for the evaluation of Plaintiff's claimed mental impairment and the completion of a Psychiatric Review Technique form. (A.R. 130.) On October 5, 1999, Plaintiff, who was represented by counsel, appeared and testified at a supplemental hearing before Administrative Law Judge Sally Reason ("ALJ").¹ (A.R. 95-126.) In a March 10, 2000 written decision, the ALJ denied Plaintiff's request for benefits, and the Appeals Council subsequently affirmed the ALJ's decision. (A.R. 15-24, 4-5.)

¹ Plaintiff's counsel, who also represented Plaintiff at the October 5, 1999 hearing, asserts that the hearing transcript misidentifies the ALJ as Martha R. Reeves, rather than as Sally Reason. (See Joint Stip. at 3.) That contention appears to be correct. (See A.R. 15.)

1 **BACKGROUND AND SUMMARY OF ADMINISTRATIVE DECISION**

2

3 **A. Plaintiff's Medical Evidence**

4

5 With respect to Plaintiff's claimed physical impairments, the ALJ

6 had before her records from Plaintiff's treating physician, Dr. Michael

7 Roback, as well as other physicians to whom Plaintiff was referred, for

8 the period from March 1996, to September 1999. (A.R. 266-340, 381-82,

9 397-405.) Dr. Roback's notes show that Plaintiff had hernia surgery in

10 February 1996 (A.R. 310.) In his initial report dated March 30, 1996,

11 Dr. Roback found that Plaintiff suffered from "chronic, symptomatic,

12 posttraumatic injury of the lumbar spine with lower lumbar

13 musculotendino-ligamentous involvement," with "right and left posterior

14 joint damage and suggestions of slight inter-vertebral disc deformity."

15 (A.R. 313.)

16

17 In a December 5, 1997 letter, Dr. Roback stated that "[Plaintiff]

18 will be unable to work for an indefinite period." (A.R. 381.) In

19 another letter from the same date, Dr. Roback further explained that

20 Plaintiff has had extensive treatment with minimal relief, and that

21 "[i]t is apparent that [Plaintiff] will not be able to return to work[;]

22 therefore, I am requesting that any and all financial provisions be made

23 for him." (A.R. 382.)

24

25 Dr. Roback's records from 1996 to 1998 also show that Plaintiff was

26 using a TENS unit to treat his back injuries, and that he was taking

27 Darvocet and Paraforte. (A.R. 299, 334, 337, 339.) In Dr. Roback's

28 records from 1999, he noted that Plaintiff: was benefitting from using

1 the TENS unit (A.R. 397, 399, 402-04); was experiencing no change in his
2 condition and no new symptoms (A.R. 401); and was managing his pain by
3 using the TENS unit and taking pain medication (A.R. 403-04).

4
5 In a January 21, 1997 report, Dr. Arthur Garfinkel, an orthopedic
6 surgeon who examined Plaintiff at the request of the Commissioner,
7 diagnosed Plaintiff with myeloligamentous strain of the lumbosacral
8 spine, lumbar radiculopathy, and possible herniated nucleus pulposi.
9 (A.R. 255.) He found that Plaintiff "should be precluded from
10 activities requiring occasional lifting or carrying greater than 35
11 [pounds], frequent lifting or carrying greater than 15 [pounds]" and
12 "activities requiring frequent or repetitive bending, stooping,
13 kneeling, squatting, climbing, crawling, and/or balancing." (*Id.*)

14
15 In a July 23, 1998 report, Dr. H. Harlan Bleecker, an orthopaedic
16 physician who examined Plaintiff at the request of the Commissioner,
17 diagnosed Plaintiff with chronic low back pain and degenerative disc
18 disease at the L5-S1 level. (A.R. 345.) Dr. Bleecker found that
19 Plaintiff can "occasionally lift and carry 20 pounds, and frequently
20 lift and carry 10 pounds" and "can stand, walk, and sit for six hours."
21 (*Id.*)

22
23 In a November 17, 1998 report, Dr. Michael Shlens, an orthopaedic
24 physician who examined Plaintiff at the request of the Commissioner,
25 diagnosed Plaintiff with: 1) residuals of a lumbar sprain; 2)
26 degenerative lumbar disc disease; 3) history of headaches; and 4)
27 "[p]robable depressive reaction with musculoskeletal manifestation."
28 (A.R. 371.) Dr. Shlens found that Plaintiff should be restricted from

1 heavy lifting or repetitive bending or squatting. (A.R. 372.) Dr.
2 Shlens further explained that Plaintiff "either [had] a depressive
3 reaction or [was] grossly enlarging upon his condition," and suggested
4 an additional psychological evaluation to investigate that issue. (A.R.
5 372.)

6
7 In a June 17, 1999 evaluation performed by Dr. Lawrence Feiwell for
8 the Workers' Compensation Appeals Board, Dr. Feiwell diagnosed Plaintiff
9 with degenerative disc disease at the L5-S1 level and chronic lumbar
10 myofascial sprain-strain with possible radiculopathy. (A.R. 393.) Dr.
11 Feiwell found that Plaintiff should be precluded from performing heavy
12 lifting and repetitive bending and stooping. (A.R. 394.)

13
14 Plaintiff also submitted objective laboratory testing regarding his
15 physical impairments. (See A.R. 245 -- September 11, 1995 x-ray of
16 lumbar spine showing "[m]ild degenerative disc disease at the L5-S1
17 level"; 246 -- September 11, 1995 x-ray of S1 joints showing "[n]o
18 abnormality"; 322-23 -- March 29, 1996 EMG of Plaintiff's right and left
19 lower extremities, which was "normal" and showed "normal distal sensory
20 [of] both sural nerves," but noting that such results "[did] not exclude
21 the presence of a sensory radiculopathy"; 413 -- October 8, 1999 MRI of
22 the lumbar spine, showing that, since Plaintiff's prior October 28, 1996
23 MRI, "there has been progression of the LS-S1 deteriorative disc level
24 changes with new inferior L5 greater than superior S1 vertebral body
25 fatty infiltration," and "the L5-S1 disc bulging now appears to be
26 symmetric and along with disc space narrowing has crowded the exits of
27 both L5 nerves.")

1 With respect to Plaintiff's claimed mental impairments, Dr. Jeffrey
2 Butler, a psychologist, stated in an October 4, 1999 letter that he had
3 first seen Plaintiff on June 11, 1998, upon the recommendation of
4 Plaintiff's counsel, and Plaintiff thereafter had weekly psychotherapy
5 sessions with him, which he recommended that Plaintiff continue. (A.R.
6 407.) In a Mental Assessment form completed on the same date, Dr.
7 Butler found that Plaintiff was "moderately limited" in: three areas
8 of understanding and memory; eight areas of sustained concentration and
9 persistence; four areas of social interaction; and five areas of
10 adaptation. (A.R. 408-11.)

11
12 In a July 23, 1998 report, Dr. Melanie Moran, a psychologist who
13 examined Plaintiff at the request of the Commissioner, diagnosed
14 Plaintiff with "[p]robable depression, not otherwise specified, mild
15 degree." She noted that "[Plaintiff] does continue to interact with
16 others and can maintain fair focus," and his "[n]eurovegetative signs
17 are mild." (A.R. 359.) Dr. Moran further noted that:

18
19 [Plaintiff] does evidence mild cognitive and emotional
20 limitations regarding his ability to learn a simple repetitive
21 skill and adapt to minimal changes in the work environment.
22 He does report being quite withdrawn and did appear withdrawn
23 during the evaluation, to some extent. This could affect his
24 overall ability to relate to others and to adapt to minimal
25 changes in the work environment.

26
27 [Plaintiff] is capable of learning a simple, repetitive
28 skill but may have some difficulty sustaining pace and focus.

1 [Plaintiff's] concentration and focus are mildly compromised
2 by what appears to be his discomfort level.

3
4 Reasoning capacities are concretely intact. [Plaintiff]
5 can remember and comply with simple one- and two-part
6 instructions. He does have more difficulty with details,
7 again due to some compromise in his concentration and focusing
8 ability. It is not felt that there is actual memory loss.
9 [Plaintiff] does not require personal supervision. He may
10 require some repetition, and may have difficulty maintaining
11 a regular schedule, again for the same reasons.

12
13 (A.R. 359-60.)
14

15 In a November 9, 1998 report, Dr. Richard Baker, a physician who
16 examined Plaintiff at the request of the Commissioner, diagnosed
17 Plaintiff with adjustment disorder with mixed anxiety and depressed
18 mood, and explained that this disorder was chronic and might be
19 characterized as mood disorder, not otherwise specified. (A.R. 367.)
20 Dr. Baker further noted that Plaintiff's depression "[stemmed] from
21 chronic pain and the financial and personal and social consequences of
22 his not being able to earn a living." (A.R. 367.)
23

24 The record also contains a December 29, 1998 Psychiatric Review
25 Technique form, completed by a state agency physician whose identity is
26 unclear, noting that Plaintiff's mental impairments were "not severe"
27 and that Plaintiff suffered from adaptive and mood disorders. (A.R.
28 373, 376.) The form further notes that: Plaintiff had only "slight"

1 restriction in his activities of daily living and in maintaining social
2 functioning; Plaintiff would "seldom" experience deficiencies of
3 concentration; and there was "insufficient evidence" to determine
4 whether Plaintiff would experience episodes of deterioration or
5 decompensation in daily living. (A.R. 380.)

6
7 **B. The ALJ's Decision**
8

9 At the June 30, 1998 hearing, ALJ Lang elicited testimony from:
10 Plaintiff; Eric Henderson, a nurse who cares for Plaintiff's cousin at
11 the residence where Plaintiff lives; and Freeman Leeth, a vocational
12 expert. (A.R. 38-92.) At the October 5, 1999 hearing, the ALJ
13 elicited testimony from both Plaintiff and June Hagen, a vocational
14 expert. (A.R. 93-126.)
15

16 In her March 10, 2000 decision, the ALJ found that Plaintiff met
17 the disability insured status requirements on August 2, 1995, his
18 claimed disability onset date, and continued to meet them through the
19 date of her decision. (A.R. 23.) She found that Plaintiff had not
20 engaged in substantial gainful activity since that onset date and was a
21 "younger individual," pursuant to 20 C.F.R. § 404.1563, at the time of
22 the decision, with more than a high school education. (*Id.*) She
23 concluded that Plaintiff had "severe" musculoskeletal and emotional
24 impairments, but did not have an impairment or combination of
25 impairments listed in, or medically equivalent to an impairment listed
26 in, Appendix 1, Subpart P, Regulation No. 4. (*Id.*)
27

28 The ALJ determined that Plaintiff had the residual functional

1 capacity to perform "light" work with "no repetitive or frequent
2 bending, stooping, squatting, climbing, crawling or balancing," and was
3 "restricted to simple work."² (A.R. 23.) She found that Plaintiff's
4 allegations "were not fully credible or reliable based upon the
5 cumulative medical and lay record as analyzed herein." (*Id.*) The ALJ
6 further found that Plaintiff was unable to perform his past relevant
7 work and did not have any transferable skills, but could perform other
8 jobs in the national economy, such as cleaner/housekeeper, packager, and
9 electrode cleaner. (A.R. 24.) Accordingly, the ALJ concluded that
10 Plaintiff was not entitled to DIB. (*Id.*)

11 12 STANDARD OF REVIEW

13
14 This Court reviews the Commissioner's decision to determine
15 whether it is free from legal error and supported by substantial
16 evidence. Smolen v. Chater, 80 F.3d 1273, 1279 (9th Cir. 1996). The
17 Commissioner's decision must stand if it is supported by substantial
18 evidence and applies the appropriate legal standards. Saelee v. Chater,
19 94 F.3d 520, 521 (9th Cir. 1996). Substantial evidence is "more than a
20 mere scintilla but less than a preponderance -- it is such relevant
21 evidence that a reasonable mind might accept as adequate to support the
22 conclusion." Moncada v. Chater, 60 F.3d 521, 523 (9th Cir. 1995).

23
24 Although this Court cannot substitute its discretion for that of
25 the Commissioner, this Court nonetheless must review the record as a

26
27 ² "Light work" involves "lifting no more than 20 pounds at a
28 time with frequent lifting or carrying of objects weighing up to 10
pounds." 20 C.F.R. §§ 404.1567(b); 416.967(b).

1 whole, "weighing both the evidence that supports and the evidence that
2 detracts from the [Commissioner's] conclusion." Desrosiers v. Sec'y. of
3 Health and Human Serv., 846 F.2d 573, 576 (9th Cir. 1988); see also
4 Jones v. Heckler, 760 F.2d 993, 995 (9th Cir. 1985). "The ALJ is
5 responsible for determining credibility, resolving conflicts in medical
6 testimony, and for resolving ambiguities." Andrews v. Shalala, 53 F.3d
7 1035, 1039-40 (9th Cir. 1995). This Court must uphold the
8 Commissioner's decision if it is supported by substantial evidence and
9 free from legal error, even when the record reasonably supports more
10 than one rational interpretation of the evidence. *Id.* at 1041; see also
11 Morgan v. Commissioner of the Soc. Sec. Admin., 169 F.3d 595, 599 (9th
12 Cir. 1999); Flaten v. Secretary, 44 F.3d 1453, 1457 (9th Cir. 1995).

13 14 DISCUSSION

15
16 In a somewhat scattershot and cursory fashion, Plaintiff alleges
17 that there are nine "disputed issues" requiring resolution in this
18 action. Plaintiff's first stated "issue" simply asks the Court to
19 consider the record "as a whole" (Joint Stip. at 4-5), a request that is
20 unnecessary. The Court, as noted above, is aware of its duty to do so
21 on review. Accordingly, the first "issue" is a non-issue and does not
22 require additional consideration or resolution.

23
24 Plaintiff's remaining eight "issues" essentially fall into five
25 categories. First, Plaintiff contends that the ALJ failed to evaluate
26 his claimed pain, the side effects of his medication, and the testimony
27 of a third party properly. Second, Plaintiff contends that the ALJ
28 failed to evaluate properly the records of Dr. Roback, his treating

1 physician, and improperly rejected Dr. Roback's opinion that Plaintiff
2 was "unable to work." Third, Plaintiff contends that the ALJ failed to
3 develop the record and evaluate properly the evidence regarding his
4 mental impairment and several physical conditions. Fourth, Plaintiff
5 contends that the ALJ erred in two respects in finding that Plaintiff
6 can perform work in the national economy and is not disabled. Fifth,
7 Plaintiff contends that, because he was found to be disabled under a
8 later decision of the Commissioner, the Court should assume that the ALJ
9 decision in question was erroneous.

10
11 **A. The ALJ's Consideration Of Plaintiff's Subjective Symptom Testimony**
12 **Does Not Warrant Reversal.**
13

14 Plaintiff contends that the ALJ erred in finding Plaintiff's
15 testimony as to his subjective symptoms to be not fully credible or
16 reliable. More specifically, Plaintiff argues that the ALJ's analysis
17 contained only general findings and relied simply on the conclusory
18 assertion that Plaintiff's testimony was "vague." (Joint Stip at 6-7.)
19 Plaintiff also complains that the ALJ failed to consider the side
20 effects of his medications. (*Id.*) Plaintiff also contends that the ALJ
21 did not properly consider the testimony provided by a third party, Eric
22 Henderson, at the June 30, 1998 hearing before ALJ Lang. (*Id.*)
23

24 **1. The Governing Standards**
25

26 In order to evaluate properly a claimant's pain and other symptoms
27 and their effect on his ability to work, 20 C.F.R. § 404.1529(c)(3)
28 provides that "other evidence," besides objective medical evidence,

1 shall be considered. This includes such evidence as the claimant's
2 testimony, statements by treating and nontreating sources, and
3 observations by third parties. Section 404.1529(c)(3) states that
4 relevant factors to be considered include: daily activities; the
5 location, duration, frequency, and intensity of the claimant's pain or
6 other symptoms; precipitating and aggravating factors; the type, dosage,
7 effectiveness, and side effects of any medication the claimant takes or
8 has taken to alleviate his pain or other symptoms; treatment, other than
9 medication, he receives or has received for relief of his pain or other
10 symptoms; and any measures he uses or has used to relieve his pain or
11 other symptoms.

12
13 Section 404.1529(c)(4) further provides:
14

15 We will consider your statements about the intensity,
16 persistence, and limiting effects of your symptoms, and we
17 will evaluate your statements in relation to the objective
18 medical evidence and other evidence, in reaching a conclusion
19 as to whether you are disabled. We will consider whether
20 there are any inconsistencies in the evidence and the extent
21 to which there are any conflicts between your statements and
22 the rest of the evidence, including your history, the signs
23 and laboratory findings, and statements by your treating or
24 nontreating source or other persons about how your symptoms
25 affect you. Your symptoms, including pain, will be determined
26 to diminish your capacity for basic work activities to the
27 extent that your alleged functional limitations and
28 restrictions due to symptoms, such as pain, can reasonably be

1 accepted as consistent with the objective medical evidence and
2 other evidence.

3
4 According to Social Security Ruling 96-7p: "Because symptoms, such
5 as pain, sometimes suggest a greater severity of impairment than can be
6 shown by objective medical evidence alone, the adjudicator must
7 carefully consider the individual's statements about symptoms with the
8 rest of the relevant evidence in the case record in reaching a
9 conclusion about the credibility of the individual's statements if a
10 disability determination or decision that is fully favorable to the
11 individual cannot be made solely on the basis of objective medical
12 evidence."

13
14 Case law further provides that, once a disability claimant produces
15 objective medical evidence of an underlying impairment that could
16 reasonably be expected to cause some level of pain of the type which the
17 claimant alleges, the claimant's subjective complaints regarding the
18 severity of his or her pain may not be discredited based solely on a
19 lack of objective medical evidence to corroborate the allegations.
20 Tonapetyan v. Halter, 242 F.3d 1144, 1147-48 (9th Cir. 2001); Bunnell v.
21 Sullivan, 947 F.2d 341, 345 (9th Cir. 1991); Fair v. Bowen, 885 F.2d
22 597, 601 (9th Cir. 1985). As the Ninth Circuit has explained:

23
24 [A]n ALJ's finding that a claimant generally lacked
25 credibility is a permissible basis to reject excess pain
26 testimony. But, because a claimant need not present clinical
27 or diagnostic evidence to support the severity of his pain,
28 Gonzalez v. Sullivan, 914 F.2d 1197, 1201 (9th Cir. 1990)

1 (stating that "it is the very nature of excess pain to be out
2 of proportion to the medical evidence"), a finding that the
3 claimant lacks credibility cannot be premised wholly on a lack
4 of medical support for the severity of his pain.

5
6 Light v. Social Security Admin., 119 F.3d 789, 792 (9th Cir. 1997).

7
8 Unless the evidence suggests affirmatively that a claimant is
9 malingering, the ALJ must provide clear and convincing reasons for
10 rejecting the claimant's excess pain or symptom testimony, such as
11 conflicts between the claimant's testimony and conduct, or internal
12 contradictions in the claimant's testimony. Dodrill v. Shalala, 12 F.3d
13 915, 918 (9th Cir. 1993); Light, 119 F.3d at 792. In determining
14 whether a claimant's testimony regarding the severity of his symptoms is
15 credible, the ALJ may consider: "(1) ordinary techniques of credibility
16 evaluation, such as the claimant's reputation for lying, prior
17 inconsistent statements concerning the symptoms, and other testimony by
18 the claimant that appears less than candid; (2) unexplained or
19 inadequately explained failure to seek treatment or to follow a
20 prescribed course of treatment; and (3) the claimant's daily
21 activities." Smolen, 80 F.3d at 1284.

22
23 The Court will give great weight to the ALJ's credibility
24 assessment. Anderson v. Sullivan, 914 F.2d 1121, 1124 (9th Cir. 1990);
25 Browner v. Secretary, 839 F.2d 432, 433 (9th Cir. 1988)(recognizing that
26 the ALJ's credibility determination is to be given great weight when
27 supported specifically). However, when an ALJ's decision rests on a
28 negative credibility evaluation, "the ALJ must make findings on the

1 record and must support those findings by pointing to substantial
2 evidence on the record." Cequerra v. Secretary, 933 F.2d 735, 738 (9th
3 Cir. 1991); Oreteza v. Shalala, 50 F.3d 748, 750 (9th Cir. 1995)(the
4 ALJ's findings must be "sufficiently specific to permit the reviewing
5 court to conclude that the ALJ did not arbitrarily discredit the
6 claimant's testimony.") When discrediting a claimant's testimony, it is
7 not enough for the ALJ to make only general findings; he must state
8 which pain testimony is not credible and what evidence suggests that the
9 complaints are not credible. See Swenson v. Sullivan, 876 F.2d 683, 688
10 (9th Cir. 1979).

11 12 **2. The ALJ's Analysis**

13
14 In this case, in rejecting Plaintiff's claimed limitations and
15 symptoms, the ALJ explained:

16
17 The undersigned did not find [Plaintiff] to be fully credible
18 or reliable. [Plaintiff] was vague in some aspects of
19 testimony. He indicated that he had lumbosacral disc disease
20 and that his left leg goes out on him. He did not describe a
21 specific medically credible pain dermatome. [Plaintiff] made
22 allegations which were inconsistent with other statements in
23 the record. For example, he testified that he could only sit
24 for about 10 minutes, and stand for 1/2 hour, whereas he
25 elsewhere indicated much greater capacities (e.g., Exhibit 4F,
26 p. 43). [Plaintiff] also did not seem totally familiar with
27 his own situation, indicating that he did not know that
28 surgery had been considered. Further, [Plaintiff] indicated

1 that he was not currently being seen for his musculoskeletal
2 concerns. Apparently, he now takes Darvocet and Parafon 500.
3 He indicated that medications help, though indicating some
4 gastrointestinal upset as a side effect. There was no
5 indication of contemporaneous complaints about side effects.
6 The record does, indeed, indicate that [Plaintiff] has availed
7 himself of various conservative therapies, including
8 acupuncture, physical therapy, transcutaneous nerve stimulator
9 (TENS), etc. The file references [Plaintiff's]
10 acknowledgments that his symptoms are improved with
11 medications or therapies (e.g., Exhibit 4F, p. 37, Exhibit 6F,
12 p. 6).

13
14 In addition to the foregoing, the undersigned emphasizes
15 that the various physicians of record have considered
16 [Plaintiff's] subjective complaints in assessing or rating
17 [his] disability status. The weight of that opinion evidence
18 clearly is that [Plaintiff] can perform a wide range of work.
19 . . .^[3]

20
21 While [Plaintiff] is seen by Dr. Butler for psychological
22 problems, the record is devoid of significant psychiatric
23 signs showing abnormalities in behavior, affect, thought,
24 memory, orientation or contact with reality so as to support
25

26 ³ At this point, the ALJ briefly noted that, in his most recent
27 report, Plaintiff's treating physician opined that Plaintiff cannot
28 work. As discussed in more detail in Section B, the ALJ adequately
explained why she disregarded that ultimate conclusion by Plaintiff's
treating physician.

1 a disabling mental component. Further, [Plaintiff] is not
2 taking any medications for depression or other emotional
3 symptoms.

4
5 The undersigned also notes that [Plaintiff] was asked
6 leading questions [by] counsel at the hearing and provided
7 self-serving responses which did not come across to the
8 undersigned as authentic or reliable. [Plaintiff] did not
9 make eye contact with the undersigned at the hearing when
10 discussing his emotional status.

11
12 (A.R. 17-18.)

13
14 **3. The ALJ's Credibility Analysis Sufficed Under The**
15 **Governing Standards Of Review.**

16
17 As set forth above, the ALJ first found that Plaintiff's testimony
18 was vague with respect to his failure to "describe a specific medically
19 credible pain dermatome," his lumbosacral disc disease, and his claim
20 that his left leg "goes out." When asked by the ALJ to explain why he
21 believes he cannot work, Plaintiff provided only a nonspecific, and
22 exaggerated, response, stating:

23
24 Because I suffer a lot of pain in my left side from my foot
25 up. *It interferes with everything that I do daily.* And my
26 leg also gives out on me a lot, sometime I get a lot of pain
27 in my right leg, but I'm suffering in my left side from my
28 stomach all the way up to my back.

1 (A.R. 105; emphasis added.)

2
3 When Plaintiff's counsel attempted to obtain more specific
4 testimony from Plaintiff, he was successful. When counsel asked
5 Plaintiff how long he could sit without discomfort, Plaintiff
6 equivocally responded: "It changes, it's different. Anywhere from
7 moments to [a] half hour." (A.R. 107-08.) When counsel asked Plaintiff
8 whether he had "any trouble standing," Plaintiff responded: "Yes, I
9 can stand different, the pain is consistent, it's just going on. So,
10 whenever there's irritation, then it's just more, I stand, I just got to
11 do something else." (A.R. 108.) When counsel questioned Plaintiff as
12 to his leg pain, which he claimed was "unbearable," Plaintiff described
13 such pain as occurring on an intermittent and infrequent basis that
14 could strike at any time, but failed to indicate where in his leg such
15 overwhelming pain was occurring. (A.R. 109 -- "Sometime[s] just walking
16 it [still] happens. I get a sharp pain and I got to come down to the
17 floor [and] stay there until the pain goes away [and] there's nothing I
18 can do.") When questioned by counsel about how often he walks and what
19 distance he can walk before experiencing any problems, Plaintiff
20 ambiguously responded: "Different things happen when I walk. [It]
21 changes, if, if I walk a block I feel something, if it's, if it's
22 pulling up in the front part of my stomach or if it's pulling up in my
23 back or some down my legs just start numbing." (A.R. 108.) With
24 respect to his lumbar impairment, when counsel asked Plaintiff whether
25 he had problems lifting, bending, or raising his hands above his
26 shoulders, Plaintiff simply responded that he did not lift or bend and
27 that he had problems "doing anything" extending his arms, but did not
28 describe whether these activities caused pain to a specific location of

1 his back or identify any pain in his back that precluded these
2 activities. (A.R. 108, 110.)

3
4 Thus, the ALJ's statement that Plaintiff's testimony regarding his
5 lumbar problems and leg "going out" was vague in some aspects and not
6 sufficiently specific in describing the origin or location of his pain
7 is supported by substantial evidence and constitutes a clear and
8 convincing reason for rejecting Plaintiff's testimony regarding his leg
9 and lumbar pain and related limitations. See e.g., Tonapetyan, 242 F.3d
10 at 1148 (ALJ's reliance on, *inter alia*, claimant's tendency to
11 exaggerate, was substantial evidence supporting his adverse credibility
12 finding); Anderson, 914 F.2d at 1123-24 (ALJ properly found that the
13 claimant lacked credibility based on his evasiveness).

14
15 The ALJ's determination that some of Plaintiff's testimony was
16 inconsistent with his own statements and with other evidence of record
17 also constituted a clear and convincing reason to find him not fully
18 credible. For instance, at the June 30, 1998 hearing, Plaintiff
19 testified that he could walk for 15 minutes; he could stand 20 minutes;
20 and he could stand longer than he can sit (*i.e.*, could sit for less than
21 20 minutes); however, at the October 5, 1999 hearing, he testified that
22 he could sit for "moments to [a] half hour".⁴ (A.R. 59-60, 107-08.) As

23
24 ⁴ The Court notes that the ALJ slightly misstated Plaintiff's
25 testimony at the hearing (*viz.*, stating that Plaintiff testified that he
26 "could only sit for about 10 minutes, and stand for 1/2 hour."
27 Regardless, as the ALJ's credibility finding is based on more than
28 adequate reasons supported by substantial evidence, any slight
misstatement in characterizing his claimed limitations, which were
nevertheless inconsistent at different points in the record, is not
grounds for reversing her credibility finding. See, e.g., Batson v.
Commissioner of Social Security, 359 F.3d 1190, 1197 (9th Cir.

1 the ALJ pointed out, in March 1996, Plaintiff reported to Dr. Michael
2 Roback, his treating physician, that he could walk 30 minutes and sit 50
3 minutes. (A.R. 308.) Significantly, Dr. Roback concluded that
4 Plaintiff's condition already had become "permanent and stationary" nine
5 months prior to that date. (A.R. 277.) Plaintiff testified in October
6 1999 that he cannot bend. (A.R. 108.) In June 1998, Plaintiff
7 testified that he generally needs help getting up from laying down.
8 (A.R. 54-55.) Yet, in a November 17, 1998 examination, Dr. Shlens
9 observed that Plaintiff: was able to "[get] up and down from a
10 recumbent position with no evidence of guarding or spasm" at his
11 examination; had normal reflexes; and showed no motor deficits of the
12 lower extremities. (A.R. 370-72.) Dr. Schlens also found that:
13 Plaintiff's neurological components . . . are normal"; "there is no
14 atrophy to correlate with his symptom complex"; and his claimed symptoms
15 are the result of either "a depressive reaction" or he "is grossly
16 enlarging upon his condition." (A.R. 371-72.) These inconsistencies in
17 Plaintiff's own testimony and as compared to the objective medical
18 evidence are proper bases for rendering an adverse credibility finding.
19 See Morgan, 169 F.3d at 599-600 (ALJ properly relied on medical reports
20 demonstrating inconsistencies in a claimant's symptoms in rejecting his
21 credibility; Light, 119 F.3d at 792 (internal conflicts in claimant's
22 statements are a proper basis for discrediting allegations regarding

23
24 2004)(even if ALJ committed some error in characterizing the claimant's
25 statements regarding his limitations, such error was harmless, as the
26 ALJ's credibility and residual functional capacity findings were
27 grounded on more than substantial evidence). See also Curry v.
28 Sullivan, 925 F.2d 1127, 1131 (9th Cir. 1990) (ALJ's error in finding
that the claimant had a high school diploma and was 50 years old was
harmless because it did not affect the determination that the claimant
was literate, able to communicate in English, and was "closely
approaching advanced age").

1 limitations); see also Thomas v. Barnhart, 278 F.3d 947, 954, 959 (9th
2 Cir. 2002)(ALJ properly rejected the claimant's credibility based in
3 part on her exaggeration of pain in two physical examinations).

4
5 Aside from these factors, the ALJ appropriately found that
6 Plaintiff's demeanor, such as his failure to make eye contact, and the
7 nature of his testimony, which were self-serving responses to leading
8 questions, indicated that his testimony was not reliable or authentic.
9 See Thomas, 278 F.3d at 960 (ALJ appropriately based his rejection of
10 the claimant's testimony on her demeanor at the hearing, noting that
11 "she seemed to engage in considerable histrionic exaggeration"); Sousa
12 v. Callahan, 143 F.3d 1240, 1243 (9th Cir. 1998)(an ALJ may "disregard
13 self-serving statements made by claimants if it finds them to be
14 incredible on other grounds"); Bunnell, 947 F.2d at 346 (ALJ may
15 properly reject a claimant's credibility by using "ordinary techniques
16 of credibility evaluation").

17
18 The Court has carefully reviewed Plaintiff's testimony at both
19 hearings. Summarized fairly, Plaintiff testified that he suffers from
20 "unbearable" pain and, as a result, has no daily activities of any kind.
21 Plaintiff stated that he sleeps very little and spends his day
22 alternating between periods of standing, walking, sitting, and laying
23 down; he cannot bend or lift anything; he does not watch television or
24 read; he does not cook and rarely eats; and he is simply existing. At
25 times, he has laid on the floor for 24 hours and done nothing else,
26 because he is scared to move. As Plaintiff put it, "I don't do
27 nothing." (A.R. 51-52, 54-55, 57-61, 80-81, 107-11, 116-17.)

1 The ALJ's conclusion that this testimony was not consistent with
2 the medical evidence of record was legitimate. While a claimant need
3 not present clinical evidence substantiating the severity of his pain,
4 the level of pain which Plaintiff claims, i.e., essentially utter
5 incapacitation and a life akin to vegetation, is not that which
6 reasonably could be expected to flow from the objective medical findings
7 rendered by treating and examining physicians. In this case, the ALJ
8 gave a detailed explanation of why she found Plaintiff not fully
9 credible and reliable, using illustrative examples. Plaintiff's
10 contention that this equates to an improper "general" rejection of his
11 testimony is without merit. See Tonapetyan, 242 F.3d at 1148. The
12 ALJ's analysis of Plaintiff's credibility, therefore, does not
13 constitute reversible error.

14
15 **4. The ALJ Did Not Err By Failing To Find Any Limitations Caused**
16 **By The Side Effects Of Plaintiff's Medication.**
17

18 Plaintiff's contention that the ALJ erred in failing to assess
19 properly the "side effects" of Plaintiff's medication is without merit.
20 When asked about the side effects of his medications, Parafon and
21 Darvocet, Plaintiff merely responded that these medications "[make] my
22 stomach [hurt] sometime[s]." (A.R. 106.) However, Plaintiff also
23 testified that he can mitigate this side effect by eating, which he
24 makes the effort to do. (A.R. 55.) There is no basis for finding
25 reversible error in this respect.

26 ///

27 ///

28 ///

1 **5. The ALJ's Failure To Address Mr. Henderson's Testimony Does**
2 **Not Warrant Reversal.**

3
4 Plaintiff lives with his cousin, a quadraplegic. Eric Henderson,
5 a nurse who cares for the cousin between the hours of 10:00 a.m. and
6 8:00 p.m, testified at the June 30, 1998 hearing. Although Plaintiff
7 asserts that Mr. Henderson provided "important testimony as to
8 [Plaintiff's] exertional limitations" (Joint Stip. at 5), he is
9 mistaken. Henderson only testified as to his general observations of
10 Plaintiff. (A.R. 65-68.) In particular, Henderson testified that: he
11 "notifies" that Plaintiff sits "on the average from 15 to 25 minutes"
12 before getting up and "sitting on the couch about another 25/25
13 minutes"; he helps Plaintiff get up; Plaintiff lays more than he sits;
14 Plaintiff watches television; and Plaintiff spends substantial time
15 talking to his cousin. (A.R. 65-68.) Moreover, Mr. Henderson conceded
16 his lack of knowledge as to Plaintiff's claimed pain and how it affects
17 him, stating: "*I don't know what type of pain he has*" and "*I don't know*
18 *how long the pains are.*" (A.R. 67; emphasis added.)

19
20 Henderson, thus, provided no clear testimony regarding Plaintiff's
21 limitations. While Henderson's brief testimony confirmed Plaintiff's
22 statements that he alternates between sitting and standing positions, a
23 matter that was not in dispute, his testimony also contradicted
24 Plaintiff's testimony that he does not watch television and does
25 "nothing." If there was any error in the ALJ's failure to acknowledge
26 Henderson's testimony specifically, it was harmless, as the Court can
27 confidently conclude that no reasonable ALJ considering this case would
28 have reached a different conclusion had he or she expressly considered

1 and addressed Henderson's testimony. See Stout v. Commissioner, 454
2 F.3d 1050, 1056 (9th Cir. 2006)(when an ALJ fails to discuss competent
3 lay testimony, a reviewing court cannot find harmless error "unless it
4 can confidently conclude that no reasonable ALJ, when fully crediting
5 the testimony, could have reached a different disability
6 determination").

7
8 **B. The ALJ Did Not Err In Rejecting Plaintiff's Treating Physician's**
9 **December 5, 1997 Opinion That Plaintiff Is "Unable To Work".**

10
11 Ordinarily, the opinions of a treating physician should be given
12 great, if not controlling, weight. See Social Security Ruling 96-2p.
13 When the ALJ rejects the opinion of a treating physician, even if it is
14 contradicted, the ALJ may reject that opinion only by providing specific
15 and legitimate reasons for doing so, supported by substantial evidence
16 in the record. Lester v. Chater, 81 F.3d 821, 830 (9th Cir. 1995); see
17 also Reddick v. Chater, 157 F.3d 715, 725 (9th Cir. 1998)(ALJ erred by
18 rejecting the treating physicians' opinions and relying upon Social
19 Security examiners' opinions in finding that claimant's CFS had not
20 rendered her disabled). Broad and vague reasons will not suffice for
21 rejecting the treating physician's opinion. McAllister v. Sullivan, 888
22 F.2d 599, 602 (9th Cir. 1989).

23
24 In addressing the records of Dr. Roback, Plaintiff's treating
25 doctor, the ALJ stated:

26
27 By March 1996, when [Plaintiff] came under the care of Dr.
28 Roback, he had already undergone physiotherapy, exercises,

1 injections, electrotherapy, ultrasound, traction, back
2 support, rest, and a work restriction. The initial diagnosis
3 was a lumbar spine injury with lower lumbar musculotendono-
4 ligamentous involvement, right and left posterior joint
5 damages, and suggestions of slight intervertebral disc
6 deformity. At that time, [Plaintiff] indicated that symptoms
7 were increased by walking or standing 30 minutes and markedly
8 increased after 15 minutes. For sitting, the respective
9 tolerances were 50 minutes and 60 minutes (Exhibit 4F). In
10 June 1996, [Plaintiff] continued to assert pain, but
11 acknowledged that his symptoms were better with medication and
12 therapy (id.). [Plaintiff] generally acknowledged that he had
13 improved with treatments. By March 1997, Dr. Roback
14 considered [Plaintiff's condition to be] permanent and
15 stationary. Even on a subjective basis, [Plaintiff's] back
16 pain was rated as constantly slight to intermittent, with the
17 work activities of lifting, carrying, bending, stooping and
18 squatting. [Plaintiff] was limited to work precluding heavy
19 lifting, repeated bending, stooping and squatting (Exhibit
20 4F). [Plaintiff] was placed on [a] maintenance program,
21 including the use of a TENS unit, which [Plaintiff] previously
22 acknowledged was helpful (Exhibit 6F, discussion, supra.)

23
24

25
26 On December 5, 1997, Dr. Roback indicated that
27 [Plaintiff] was then receiving treatment for his orthopedic
28 condition. Dr. Roback reiterated the MRI findings. He then

1 indicated that [Plaintiff] received only palliative relief
2 from his treatment. He opined that [Plaintiff] would not be
3 able to return to work (Exhibit 5F). As noted earlier, there
4 were no additional medical documents or evidence linked to
5 this update from Dr. Roback. Dr. Roback had previously found
6 [Plaintiff] capable of a wide range of work. The undersigned
7 has already discussed that [Plaintiff] was not a fully
8 credible witness and she does find this change in opinion
9 evidence, undoubtedly based upon [Plaintiff's] subjective
10 input, to be persuasive. Dr. Roback repeated his statement
11 [that Plaintiff] would be unable to work for an indefinite
12 period in December 1997 (Exhibit 5F).

13
14 (A.R. 18-19.) Plaintiff contends that: it was improper for the ALJ to
15 have rejected Dr. Roback's statement in his December 5, 1997 report that
16 Plaintiff is unable to work; and the ALJ improperly criticized this
17 report as being based upon Plaintiff's subjective input. (Joint Stip.
18 at 12.)

19
20 A physician's opinion that a claimant is "unable to work" may
21 invade on the province of the ALJ to determine a claimant's ultimate
22 disability. 20 C.F.R. §§ 404.1527(e)(1), 416.927(e)(1) ("We are
23 responsible for making the determination or decision about whether you
24 meet the statutory definition of disability. . . . A statement by a
25 medical source that you are 'disabled' or 'unable to work' does not mean
26 that we will determine that you are disabled."); see also Batson, 359
27 F.3d at 1194-95; Magallanes v. Bowen, 881 F.2d 747, 751 (9th Cir.
28 1989) (a treating physician's opinion "[is not] necessarily conclusive as

1 to . . . the ultimate issue of disability."). Thus, the ALJ was not
2 required to accept Dr. Roback's December 1997 opinion that Plaintiff was
3 "unable to work."

4
5 Furthermore, the ALJ correctly found that the record shows that
6 there was *no* objective medical evidence indicating that Plaintiff's
7 condition had changed between Dr. Roback's December 5, 1997 report, and
8 his March 25, 1997 report (eight months earlier), opining that Plaintiff
9 *could* work, albeit with exertional limitations (*viz.*, Plaintiff's "work
10 capacity is limited to preclude heavy lifting, repeated bending,
11 stooping and squatting"; and "a return to the [pre-injury] place of
12 employment is appropriate if reasonable accommodations can be made to
13 coincide with work restrictions"). Moreover, in that March 25, 1997
14 report, Dr. Roback opined that Plaintiff's disability was "permanent and
15 stationary" as of June 1, 1995. (A.R. 277.) As no objective medical
16 findings supported Dr. Roback's "change of heart," the ALJ's perception
17 that the December 5, 1997 opinion appeared to be based only on
18 Plaintiff's subjective complaints was not unreasonable. Indeed, that
19 Dr. Roback apparently was motivated by personal concern for Plaintiff in
20 his December 1997 opinion is evident, given his several references to
21 Plaintiff's need for "financial assistance" and the physician's fear
22 that, without it, Plaintiff will become "destitute." (A.R. 330-31.)

23
24 A treating physician's opinion unsupported by clinical findings,
25 and which is premised on subjective complaints that the ALJ has properly
26 found to be not credible, may be rejected. See Baylis v. Barnhart, 427
27 F.3d 1211, 1217 (9th Cir. 2005)(ALJ properly rejected a physician's
28 opinion that was not supported by clinical evidence and was based on the

1 claimant's subjective complaints); see also Matney v. Sullivan, 981 F.2d
2 1016, 1019 (9th Cir. 1992)(it is appropriate for an ALJ reject the
3 opinion of a treating physician if that opinion is conclusory, brief and
4 unsupported by clinical findings). The ALJ expressly cited these
5 reasons for rejecting Dr. Roback's December 1997 conclusion that
6 Plaintiff cannot work. The ALJ committed no error in doing so.

7
8 To the extent that Plaintiff complains that the ALJ's discussion of
9 Dr. Roback's records *in toto* is vague and incomplete (Joint Stip. at
10 12), aside from Dr. Roback's December 5, 1997 opinion that Plaintiff is
11 "unable to work for an indefinite period," Plaintiff does not identify
12 any opinion or limitation expressed by Dr. Roback that the ALJ rejected.
13 The ALJ's rejection of the December 1997 opinion was quite specific and,
14 for the reasons set forth above, was legitimate, clear, and convincing.
15 Accordingly, no reversible error exists.

16
17 C. The ALJ Did Not Err In Assessing Plaintiff's Claimed Mental
18 Impairment, Hernia, Headaches, And Hemorrhoids.

19
20 Plaintiff asserts that the ALJ failed to address adequately, and to
21 develop the record fully regarding, his mental impairment. (Joint Stip.
22 at 17-18.) Plaintiff further complains that the ALJ failed to address,
23 and to develop the record fully regarding, his alleged hernia,
24 hemorrhoid, and headache impairments. (*Id.* at 19-20.)

25
26 1. Plaintiff's Mental Impairment

27
28 Plaintiff contends that the ALJ improperly relied on the report of

1 Dr. Moran, a consulting psychologist, and improperly rejected the
2 findings of Dr. Baker, a consulting physician, as not being sufficiently
3 objective. (Joint Stip. at 17.) Plaintiff further contends that the
4 record needs to be developed regarding his mental impairment, and the
5 case should be remanded for the ALJ to conduct a hearing to elicit
6 testimony from a medical expert regarding Plaintiff's mental
7 limitations. (*Id.* at 17-18.)

8
9 When the opinion of an examining physician is uncontroverted, the
10 ALJ must provide clear and convincing reasons, supported by substantial
11 evidence of record, for rejecting it. When an examining physician's
12 opinion is contradicted by that of another examining physician, the
13 opinion may be rejected for specific and legitimate reasons that are
14 based on substantial evidence of record. See, e.g., Batson, 359 F.3d at
15 1195; Tonapetyan, 242 F.3d at 1148-49; Lester, 81 F.3d at 830-31.

16
17 The Commissioner has an affirmative duty to develop the record,
18 even if the claimant is represented by counsel. Brown v. Heckler, 713
19 F.2d 441, 442-43 (9th Cir. 1993); 20 C.F.R. § 404.1512(e) (duty to re-
20 contact treating physician); see also 20 C.F.R. § 404.1519a(b) (listing
21 situations requiring a consultative examination, such as a conflict,
22 inconsistency, ambiguity, or insufficiency in the evidence). "The ALJ's
23 duty to supplement a claimant's record is triggered by ambiguous
24 evidence, the ALJ's own finding that the record is inadequate or the
25 ALJ's reliance on an expert's conclusion that the evidence is
26 ambiguous." Webb v. Barnhart, 433 F.3d 683, 687 (9th Cir. 2005) (*citing*
27 Tonapetyan, 242 F.3d at 1150).

1 In discussing the July 23, 1998 report of Dr. Moran, the ALJ
2 stated:

3
4 The undersigned finds that any emotional overlay is of
5 limited significance. As noted, there was no initial
6 allegation of a mental overlay, nor was there a history of
7 treatment until the recent past. In July 1998 consultative
8 psychological evaluation by Dr. Moran, [Plaintiff] was
9 described as alert and compliant. He was fully oriented. He
10 had some limitations in concentration, attention and memory.
11 He was considered mildly depressed. [Plaintiff's] responses
12 appeared affected by his discomfort level. The primary
13 diagnosis was probably depression, not otherwise specified,
14 mild in degree. Dr. Moran opined that [Plaintiff] evidenced
15 only mild cognitive and emotional limitations regarding his
16 ability to learn a simple, repetitive skill and adapt to
17 minimal changes in the work environment. [Plaintiff] did
18 appear to be withdrawn, which could affect his overall ability
19 to relate to others and to adapt to minimal changes. Dr.
20 Moran suggested that [Plaintiff] might have some difficulty
21 sustaining pace and focus and may have some difficulty
22 maintaining a regular schedule, which she related to
23 [Plaintiff's] discomfort level (Exhibit 8F).

24
25 (A.R. 21.)
26

27 In discussing the November 9, 1998 report of Dr. Baker, the ALJ
28 stated:

1 [Plaintiff] underwent psychiatric consultation by Dr.
2 Baker in November 1998. The mental status examination and
3 [Plaintiff's] express pain symptomatology were similar to that
4 expressed by Dr. Moran. Dr. Baker diagnosed an adjustment
5 disorder with mixed anxiety and depressed mood, now chronic,
6 and perhaps characterized as mood disorder, not otherwise
7 specified. The depression stemmed from chronic pain and the
8 financial, personal and social consequences of not earning a
9 living (exhibit 9F). The undersigned finds no impressive
10 psychiatric signs from this report which supports a disabling
11 mental component. She reiterates that [Plaintiff] is not
12 prescribed medications for emotional concerns.

13
14 (A.R. 21.)
15

16 The ALJ ultimately found that Plaintiff had "emotional" impairments
17 that "restricted [him] to simple work." (A.R. 23.) In determining
18 Plaintiff's mental residual functional capacity, the ALJ explained:
19 "Primarily based upon Dr. Moran's report, the undersigned will restrict
20 the claimant to simple, or unskilled work tasks. These tend to involve
21 repetitive work processes, where absolute focus and attention [are] not
22 necessarily crucial." (A.R. 22.)
23

24 As described previously, in her July 23, 1998 report, Dr. Moran did
25 not find that Plaintiff was unable to work due to his mental health
26 problems but, rather, found only that Plaintiff had "mild cognitive and
27 emotional limitations regarding his ability to learn a simple repetitive
28 skill and adapt to minimal changes in the work environment" and "is

1 capable of learning a simple, repetitive skill." (A.R. 359.) With
2 respect to his social functioning and ability to focus, Dr. Moran
3 explained that: "[Plaintiff] does continue to interact with others and
4 can maintain fair focus"; and Plaintiff's "[n]eurovegetative signs are
5 mild." (*Id.*) Although Dr. Moran did note other possible mental
6 problems that could or might limit Plaintiff in the future -- e.g., that
7 Plaintiff's social withdrawal "could" affect his ability to relate and
8 adapt and he "may have difficulty maintaining a regular schedule"
9 because of a compromised ability to concentrate and focus -- she did not
10 find any other specific, present limitations that were impacting
11 Plaintiff's ability to work as of the date of her evaluation. (A.R.
12 359-60; emphasis added.)

13
14 Thus, the ALJ's finding that Plaintiff's mental health impairments
15 limited him to "simple work" was based on substantial evidence and
16 consistent with Dr. Moran's report. See, e.g., Macri v. Chater, 93 F.3d
17 540, 544 (9th Cir. 1996) (ALJ did not improperly reject treating doctors'
18 opinions which were consistent with and subsumed within the ALJ's
19 determination that the claimant was capable of performing a "wide range
20 of light work"). Furthermore, as the ALJ explained, her mental residual
21 functional capacity finding, which limited Plaintiff to unskilled or
22 simple tasks, adequately encompassed Dr. Moran's description of
23 potential focus and concentration problems. See 20 C.F.R. §
24 404.1568(a) ("Unskilled work [is] work which needs little or no judgment
25 to do simple duties that can be learned on the job in a short period of
26 time[,] . . . a person can usually learn to do the job in 30 days, and
27 little specific vocational preparation and judgment are needed.")

1 With respect to the ALJ's discussion of Dr. Baker's opinion,
2 Plaintiff mistakenly contends that the ALJ "rejected" Dr. Baker's
3 November 9, 1998 opinion. Instead, as quoted above, the ALJ found Dr.
4 Baker's opinion to be consistent with Dr. Moran's opinion, noting that
5 Dr. Baker's "examination" and "[Plaintiff's] express pain
6 symptomatology" were similar to Dr. Moran's findings, and Dr. Baker's
7 report demonstrates no "disabling" mental component. This is correct.
8 Although Dr. Baker diagnosed Plaintiff with adjustment disorder with
9 mixed anxiety and depressed mood, and thoroughly detailed the symptoms
10 reported to him by Plaintiff, Dr. Baker did not note any limitations on
11 Plaintiff's ability to work or conclude that Plaintiff was "disabled" by
12 his mental health problems. Thus, the ALJ's finding regarding
13 Plaintiff's mental residual functional capacity is consistent with, and
14 does not constitute a rejection of, Dr. Baker's opinion. See Macri, 93
15 F.3d at 544.

16
17 Plaintiff has not cited any ambiguity or inadequacy in the record
18 regarding Plaintiff's mental impairment that required its further
19 development. Because the ALJ's mental residual functional capacity
20 finding is supported by substantial evidence, it is not necessary to
21 remand this case for further development of the record with respect to
22 Plaintiff's claimed mental impairment, as Plaintiff requests. After the
23 June 30, 1998 hearing, the case was remanded by ALJ Lang for an
24 additional administrative hearing following the evaluation of
25 Plaintiff's mental health impairment, in light of Plaintiff raising a
26 mental health impairment, for the first time, at that hearing. (A.R.
27 15, 130.) In addition, ALJ Lang left open the record to allow
28 Plaintiff's counsel to submit additional evidence from Dr. Butler,

1 Plaintiff's treating psychologist. (A.R. 90.) Following the June 30,
2 1998, the record was supplemented with the reports of three physicians
3 -- Dr. Baker, Dr. Moran, and Dr. Butler -- regarding Plaintiff's mental
4 impairment.⁵ Thus, there was "adequate information" in the record upon
5 which to base a mental residual functional capacity finding in this
6 case, and the duty to develop the record was not triggered.

7
8 **2. Plaintiff's Hernia, Hemorrhoids, And Headaches**
9

10 Plaintiff complains that the ALJ failed to address his allegedly
11 documented impairments of chronic hernia syndrome, chronic hemorrhoid
12 condition, and chronic headache syndrome. (Joint Stip. at 19.) The
13 court notes that Plaintiff made no claim to the Commissioner that any of
14 these three conditions constitute "impairments" which bear on his
15 ability to work. Rather, he has raised these asserted impairments for
16 the first time on review.

17
18 As a threshold matter, Plaintiff's argument rests on several
19 mischaracterizations of the record. Plaintiff's representation that he
20 "testified as to his chronic hemorrhoid condition (TR 73)" is plainly
21 false. There is no page "TR 73" in the record; A.R. 73 consists of his
22

23 ⁵ Plaintiff appropriately does not challenge the ALJ's rejection
24 of the opinion of Dr. Butler, which consisted only of a check the box
25 form in which the psychologist indicated that Plaintiff has moderate
26 limitations in various categories. (A.R. 408-11.) Dr. Butler advised
27 the Commissioner that: Plaintiff has been referred to his office at the
28 request of Plaintiff's counsel; the psychologist had not conducted any
testing; and his assessment form was based purely on his observations of
Plaintiff. (A.R. 407.) The ALJ properly rejected this opinion as
lacking any supporting objective evidence and, to the extent it was
predicated on Plaintiff's subjective complaints, found it to be not
credible. (A.R. 21-22.)

1 counsel's argument (which does not mention hemorrhoids); and Plaintiff
2 did not testify elsewhere that he suffers from hemorrhoids, much less
3 that any such problem is "chronic." Plaintiff provides no record
4 support for his assertion that the evidence showed he has received
5 "continued treatment for his chronic hemorrhoid problem," and the Court
6 has divined none. As to his hernia, Plaintiff's assertion that the
7 medical evidence showed "chronic pain in the left growing [presumably,
8 groin] area" also is inaccurate, as the cited portion of the record
9 indicated that Plaintiff reported experiencing "infrequent" pain in his
10 left groin area that was "associated" with his back problems; no mention
11 was made of a hernia issue. (A.R. 270.)
12

13 Although the ALJ did not expressly mention Plaintiff's hernia, he
14 fully discussed Plaintiff's lumbar problems following his June 1995 work
15 injury before finding that Plaintiff had "severe" musculoskeletal
16 impairments and was limited to "light" work with further postural
17 limitations during the relevant time period. (A.R. 18, 23.) Even
18 assuming, as he now asserts, that Plaintiff continues to experience
19 "discomfort in [the] left testicle area" following his hernia surgery in
20 1996, Plaintiff fails to indicate any limitations arising from such
21 discomfort for which the ALJ failed to account or which the ALJ
22 improperly rejected. See Burch v. Barnhart, 400 F.3d 676, 681-82 (9th
23 Cir. 2005)(ALJ did not err by failing to discuss the effects of the
24 claimant's impairment of obesity and its combined effect on her other
25 impairments, as there was no showing that the claimant's obesity caused
26 any functional limitations or exacerbated any other impairments). Thus,
27 Plaintiff's assertion of error based on his "chronic hernia syndrome" is
28 unavailing.

1 The records of Plaintiff's physicians contain scant reference to
2 Plaintiff's asserted headaches and hemorrhoids. The record indicates
3 that, while Plaintiff had problems with hemorrhoids prior to his alleged
4 onset date, any problems he experienced from hemorrhoids were largely
5 behind him as of August 2, 1995, his alleged onset date. Although
6 Plaintiff informed several examining physicians that he had had
7 hemorrhoid surgery in 1989 (A.R. 341, 254, 355), the only reference to
8 any problem with hemorrhoids that Plaintiff reported following his last
9 insured date was Plaintiff's statement to Dr. Roback, in March 1997,
10 that they had "flared up again" (A.R. 272). Because this condition does
11 not appear to be chronic, and even Plaintiff does not indicate how his
12 hemorrhoids would have limited his ability to work during the relevant
13 time period, the ALJ was not required to address or include any
14 limitations resulting from Plaintiff's hemorrhoids in determining his
15 residual functional capacity. See Burch, 400 F.3d at 681-82.

16
17 Similarly, although Plaintiff testified at the hearing that he
18 suffers from severe headaches daily (A.R. 117-18), Plaintiff never
19 mentioned them to his treating physicians. The only reference to such
20 headaches in the records are Plaintiff's reports of headaches to two
21 consulting physicians, namely, Dr. Baker and Dr. Shlens, after his
22 claim had been filed. (A.R. 364 -- Plaintiff informed Dr. Baker that he
23 had suffered from migraine headaches since 1996, twice daily to every
24 other day, and that his headaches are "severe" and "make his eyes
25 water"; 368 -- Plaintiff told Dr. Shlens that he "experience[d]
26 headaches," which he attributed to stress.) The ALJ found such
27 testimony by Plaintiff to be not credible, a finding which was not
28 error. Thus, the ALJ was not required to address or include any

1 limitations arising from Plaintiff's claimed headaches in determining
2 his residual functional capacity. Moreover, as the record as to such
3 headaches was neither ambiguous nor inadequate in this respect, the ALJ
4 did not have a duty to develop it. Webb, 433 F.3d at 687; see also 20
5 C.F.R. § 404.1519a(b).⁶

6
7 **D. Plaintiff's Arguments Regarding The Grids And The Questioning Of**
8 **The Vocational Expert Are Unavailing.**
9

10 Plaintiff asserts as his seventh issue that the ALJ's alleged
11 reliance on the Medical Vocational Guidelines (the "Grids") to establish
12 the presence of jobs Plaintiff could do was improper, because Plaintiff
13 has non-exertional limitations and severe pain. (Joint Stip. at 21-22.)
14 Plaintiff mischaracterizes the ALJ's decision. As discussed below, the
15 ALJ utilized a vocational expert to determine whether any occupations
16 exist in significant numbers in the national economy which Plaintiff
17 could perform, and relied upon the Grids only as a "framework." (A.R.
18 22.)

19
20 Plaintiff further contends that the ALJ's hypothetical question to
21 the vocational expert was inadequate, because the vocational expert was
22 asked only two hypothetical questions limiting Plaintiff to "light"
23 work. Plaintiff argues that he had additional non-exertional
24 impairments, consisting of further "mental restrictions," that did not
25

26 ⁶ The Court notes that, as a sixth issue, Plaintiff alleges that
27 the ALJ failed to consider his physical and mental health problems in
28 combination. (Joint Stip. at 21.) This meritless assertion warrants no
further discussion, as it is flatly belied by the ALJ's analysis and her
inclusion of exertional and non-exertional limitations, including
restricting Plaintiff to simple work due to his mental limitations.

1 allow him to perform the full range of "light" work and which should
2 have been provided to the vocational expert. (Joint Stip. at 24.)
3

4 "If the assumptions in the hypothetical are not supported by the
5 record, the opinion of the vocational expert that claimant has a
6 residual working capacity has no evidentiary value." Gallant v.
7 Heckler, 753 F.2d 1450, 1456 (9th cir. 1984). Thus, in posing a
8 hypothetical to a vocational expert, the ALJ must accurately reflect all
9 of the claimant's limitations. Embrey v. Bowen, 849 F.2d 418, 422-24
10 (9th Cir. 1987).
11

12 At the October 5, 1999 hearing, the ALJ provided the following
13 hypothetical question to the vocational expert: "If we have a
14 hypothetical individual who's limited to light work, no repetitive or
15 frequent bending, stooping, squatting, climbing, crawling, or balancing,
16 and limited to simple tasks, would [he] be able to perform any [jobs
17 other than his prior work]?" (A.R. 121-22.) The vocational expert
18 identified several jobs that fit that profile, such as housekeeper,
19 garment bagger, and electrode cleaner. (A.R. 122.) This hypothetical
20 question properly took into consideration the only mental, non-
21 exertional impairment found by the ALJ, i.e., that Plaintiff was limited
22 to performing simple tasks. The ALJ was not required to include in the
23 hypothetical the allegations he found to be not credible.
24

25 The ALJ committed no reversible error in her use of the Grids or
26 her hypothetical question to the vocational expert.
27
28

1 **E. Plaintiff's Receipt Of Social Security Benefits Following The ALJ's**
2 **Decision In This Case Does Not Show That Plaintiff Was Disabled**
3 **During The Period Of Disability In This Case.**
4

5 Plaintiff notes that he was awarded benefits pursuant to the
6 Commissioner's May 6, 2002 letter, based on a claimed onset date of
7 November 29, 2001. (Joint Stip. at 25.) Plaintiff contends that this
8 May 6, 2002 decision was the "correct one" and shows that he should have
9 been found disabled in this case. (*Id.*)
10

11 In the Appeals Council's February 25, 2003 letter denying
12 Plaintiff's request for review of the ALJ's decision in this case, the
13 Appeals Council specifically addressed this issue, stating: "[we]
14 considered the fact that since the date of the Administrative Law
15 Judge's decision, you were found to be under a disability beginning
16 December 30, 2000, based on the application you filed on May 1, 2002;
17 however, [we] found that this information does not warrant a change in
18 the Administrative Law Judge's decision [issued on March 10, 2000]."
19 (A.R. 4.)
20

21 Here, the ALJ adjudicated this case from Plaintiff's alleged onset
22 date, August 2, 1995, "through the date of [the] decision," March 10,
23 2000. Plaintiff subsequently was granted disability benefits based on
24 Plaintiff's application for benefits for a period beginning on December
25 30, 2000 -- nine months after the ending date of Plaintiff's claimed
26 disability in this case. The fact that Plaintiff was deemed disabled
27 during a subsequent period does not demonstrate that the ALJ committed
28 reversible error in not finding Plaintiff to be disabled preceding that

1 date. Cf. Bruton v. Massanari, 268 F.3d 824, 827 (9th Cir.
2 2003)(claimant's argument that his case should be remanded in light of
3 the award of benefits based on his second application was unpersuasive,
4 because the second application involved different medical evidence, a
5 different time period, and a different age classification, and the
6 decision awarding benefits was not inconsistent with the ALJ's previous
7 denial of benefits).

8
9 **CONCLUSION**

10
11 For all of the foregoing reasons, the Court finds that the
12 Commissioner's decision is based on the correct application of the
13 proper legal standards and is supported by substantial evidence, and
14 that neither reversal of the ALJ's decision nor remand is warranted.
15 Accordingly, IT IS ORDERED that Judgment shall be entered affirming the
16 decision of the Commissioner of the Social Security Administration.

17
18 IT IS FURTHER ORDERED that the Clerk of the Court shall serve
19 copies of this Memorandum Opinion and Order and the Judgment on counsel
20 for Plaintiff and for Defendant.

21
22 **LET JUDGMENT BE ENTERED ACCORDINGLY.**

23
24 DATED: September 29, 2006

25
26
27 _____/s/
28 MARGARET A. NAGLE
UNITED STATES MAGISTRATE JUDGE